KHAW CHENG POON & ORS

v.

KHAW CHENG BOK & ORS & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ARIFFIN JAKA JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NOS: P-02-360-1998 & P-02-409-1998]
20 OCTOBER 2004

SUCCESSION: *Will - Execution - Validity of - Requirements of s. 5 Wills Act 1959 not met - Whether wills failed tests for formal validity - Whether undue influence exercised over deceased in execution of wills - Whether wills valid*

DAMAGES: *Award of - Exemplary damages - Circumstances where exemplary damages may be awarded - Whether new categories of circumstances admissible*

CIVIL PROCEDURE: *Interest - Compound interest - Award of - Whether at discretion of first instance court*

CIVIL PROCEDURE: *Damages - Exemplary damages - Circumstances where exemplary damages may be awarded - Whether new categories of circumstances admissible*

The two appeals in this case arose from 3 consolidated suits relating to the estate of the late Datuk Khaw Bian Cheng ('the deceased'). The appeals concerned 2 sets of wills – one set made on 24 October 1990 ('the 1990 wills') and the other made on 3 August 1992 ('the 1992 wills'). The appellants in the first appeal were defendants in all three suits at first instance whilst the respondents were the plaintiffs. The appellants in the second appeal had intervened in one of the three suits, added themselves as defendants and filed a counterclaim. At first instance in the High Court, the judge held the 1990 wills to be valid but struck down the 1992 wills. The High Court judge also made several orders in an attempt to restore to the estate of the deceased monies and properties it had lost. Further, the judge, outraged by the conduct of the appellants in the first appeal, ordered them to pay exemplary damages of RM500,000. The appellants in the first appeal appealed *inter alia* to reverse the High Court's finding that the 1992 wills were invalid whereas the appellants in the second appeal appealed *inter alia* to declare both the 1990 and 1992 wills invalid. Collectively, the issues that fell for the Court of Appeal's

determination were whether: (i) the High Court Judge was right in holding the 1990 wills valid; (ii) the Judge was right in striking down the 1992 wills; (iii) the judge was correct in making the recovery orders; and (iv) the judge was right in awarding exemplary damages.

Held (dismissing both appeals substantially with varied orders as to costs)

Per Gopal Sri Ram JCA:

[1] The Court of Appeal would agree entirely with the High Court Judge's conclusions concerning the 1990 wills. The High Court Judge did not apply the wrong test in determining that the execution of the 1990 wills were not procured by undue influence. Once the judge concluded that the 1990 wills were valid, for all practical purposes that was the end to the appellants' case in the second appeal. No valid complaint could be directed against the judge's approach to the appellants' case in the second appeal. (pp 759 c, 760 a & 761 a-b)

[2] The 1992 wills failed the test for formal validity. They did not meet the requirements of s. 5 of the Wills Act 1959. The judge found the 1992 wills were the product of fraud and undue influence. The judge found that the deceased was so far under the influence of the first appellant in the first appeal that undue influence was exercised in relation to the 1992 wills. It was incumbent upon the first appellant to have gone into the witness box to repel the case put against him. There was thus no misdirection on the part of the High Court Judge on his unfavourable comments on the first appellant's failure to testify. It was difficult to see how in the absence of an explanation from the first appellant, the High Court Judge could have made any findings other than the one he made. The issues raised in the instant case such as fraud, undue influence and the existence of suspicious circumstances were all essentially questions of fact. (pp 761 h, 762 a-d, 763 b, 764 a-b & d-e)

[3] With regard to the recovery orders: (i) the order deducting RM577,000 from Howard Khaw's interests was not directed against Howard but merely for the benefit of the estate; (ii) Khaw Cheng Poon and Richard Poon had by their own dishonesty secreted away for their own use and benefit monies and properties belonging to the estate and the order correctly required them to disgorge; (iii) Khaw Gim Chuan was not a party to the proceedings and thus no order should have been made against her and it should accordingly be discharged; (iv) that part of the order referring to Richard Khaw's Porsche car was a slip made in the course of preparing the order and it should be set aside. (pp 765 c-d & 766 d-e)

[4] Exemplary damages are only awarded in very special circumstances identified in Lord Devlin's speech in *Rookes v. Barnard* [1964] AC 1129. No new categories are admissible. Thus the award for exemplary damages should be set aside. Although counsel had strenuously argued for the award of compound interest, it was well established that awards of interest and the rate of such awards are matters within the discretion of the first instance court and they should not be interfered with unless some error in principle is shown. On the facts there was no such error. *Rookes v. Barnard* [1964] AC 1129 (folld). *Cassell & Co Ltd v. Broome* [1972] AC 1027 (folld); *Trengganu State Economic Development Corporation v. Nadefinco Ltd* [1982] 1 MLJ 365 (refd).

*[**Bahasa Malaysia** Translation Of Headnotes*

Kedua-dua rayuan di sini berbangkit dari tiga guaman yang disatukan dan berkait dengan pusaka Datuk Khaw Bian Cheng ('si mati'). Rayuan-rayuan menyentuhi dua set wasiat – satu dibuat pada 24 Oktober 1990 ('wasiat 1990') dan satu lagi dibuat pada 3 Ogos 1992 ('wasiat 1992'). Perayu-perayu dalam rayuan pertama adalah defendan-defendan dalam ketiga-tiga guaman di mahkamah di bawah, sementara responden-responden adalah plaintif-plaintif di situ. Perayu-perayu dalam rayuan kedua telah mencelah di dalam salah satu dari tiga guaman, menjadikan diri mereka sebagai defendan di situ dan telah juga memfailkan tuntutan-tuntutan balas. Di perbicaraan di Mahkamah Tinggi, yang arif hakim memutuskan wasiat 1990 sebagai sah tetapi telah membatalkan wasiat 1992. Yang arif hakim juga telah membuat beberapa perintah bagi tujuan mengembalikan sejumlah wang dan harta yang hilang kepada pusaka si mati. Selain itu, yang arif hakim, merasa marah dengan kelakuan perayu-perayu dalam rayuan pertama, telah memerintahkan mereka supaya membayar gantirugi teladan sebanyak RM500,000. Perayu-perayu dalam rayuan pertama merayu antara lain untuk mengakas keputusan Mahkamah Tinggi bahawa wasiat 1992 adalah tak sah, manakala perayu-perayu dalam rayuan kedua merayu antara lain untuk mengisytiharkan kedua-dua wasiat 1990 dan 1992 sebagai tak sah. Pada keseluruhannya, isu-isu yang meminta keputusan Mahkamah Rayuan adalah sama ada: (i) hakim Mahkamah Tinggi betul dalam mendapati wasiat 1990 sebagai sah; (ii) hakim betul dalam membatalkan wasiat 1992; (iii) hakim betul dalam membuat perintah-perintah pengembalian; dan (iv) hakim betul dalam memerintahkan gantirugi teladan.

Diputuskan (menolak sebahagian besar rayuan-rayuan dengan beberapa perintah mengenai kos)
Oleh Gopal Sri Ram HMR:

[1] Mahkamah Rayuan bersetuju sepenuhnya dengan konklusi hakim Mahkamah Tinggi berkaitan wasiat 1990. Hakim Mahkamah Tinggi tidak menggunapakai ujian yang salah apabila memutuskan bahawa pembuatan wasiat 1990 bukanlah melalui pengaruh tidak wajar. Sebaik sahaja hakim memutuskan wasiat 1990 sah, keputusan tersebut, bagi semua maksud praktikal, menandakan berakhirnya kes perayu-perayu dalam rayuan kedua. Tiada bantahan sah boleh dibuat terhadap pendekatan yang diambil oleh hakim dalam kes perayu-perayu dalam rayuan kedua di sini.

[2] Wasiat 1992 gagal melepasi ujian formal pengesahan. Ia tidak memenuhi kehendak s. 5 Akta Wasiat 1959. Hakim mendapati wasiat 1992 sebagai dicacati fraud dan pengaruh tidak wajar. Hakim mendapati bahawa si mati berada di bawah pengaruh perayu dalam rayuan pertama dan bahawa pengaruh tidak wajar telah dikenakan ke atasnya berhubung wasiat 1992. Perayu pertama dengan itu berkewajipan untuk berdiri di kandang saksi bagi menyangkal tuduhan terhadapnya. Ini bermakna hakim Mahkamah Tinggi tidak melakukan sebarang salah arahan apabila beliau membuat komen yang menyinggung perayu pertama kerana gagal memberi keterangan. Adalah sukar untuk berkata, dalam ketiadaan penjelasan oleh perayu pertama, bahawa hakim Mahkamah Tinggi mungkin akan mencapai satu keputusan yang berbeza dari apa yang dicapainya. Isu-isu yang dibangkitkan disini, seperti fraud, pengaruh tidak wajar dan kewujudan halkeadan yang boleh mendatangkan syak, adalah semuanya isu fakta.

[3] Berhubung perintah pengembalian: (i) perintah untuk memotong RM577,000 dari kepentingan Howard Khaw bukan dituju kepada Howard tetapi adalah untuk manfaat pusaka; (ii) Khaw Cheng Poon dan Richard Poon, secara tidak jujur, telah melarikan sejumlah wang dan harta milik pusaka untuk kegunaan mereka dan perintah betul apabila meminta mereka memulangkan wang dan harta tersebut; (iii) Khaw Gim Chuan bukan satu pihak kepada prosiding yang bererti tiada perintah harus dikeluarkan terhadap beliau dan kerana itu perintah terhadapnya harus dibatalkan; (iv) bahagian perintah yang merujuk kepada kereta Porsche Richard Khaw adalah kesilapan yang dilakukan semasa proses penyediaan perintah dan ia harus diketepikan.

[4] Gantirugi teladan hanya diberi dalam kes-kes yang sangat istimewa seperti yang dinyatakan oleh Lord Devlin di dalam *Rookes v. Barnard* [1964] AC 1129. Tiada kategori baru boleh diterima. Oleh yang demikian, award gantirugi teladan di sini harus diketepikan. Walaupun peguam tegas berhujah untuk diberi award faedah berganda, sudah menjadi sesuatu yang diterima bahawa award mengenai faedah serta kadar faedah adalah perkara yang harus diputuskan di peringkat mahkamah pertama dan ia tidak harus diganggu kecuali jika terdapat kesilapan prinsip pada award. Berdasarkan fakta, tidak terdapat kesalahan sedemikian. *Rookes v. Barnard* [1964] AC 1129 (diikuti); *Cassell & Co Ltd v. Broome* [1972] AC 1027 (diikuti); *Terengganu State Economic Development Corporation v. Nadefinco Ltd* [1982] 1 MLJ 365 (dirujuk).

Case(s) referred to:
Cassell & Co Ltd v. Broome [1972] AC 1027 ***(foll)***
Clarke v. Edinburgh Tramways Co [1919] SC (HL) 35 ***(refd)***
Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 3 MLJ 457 ***(refd)***
Re R deceased [1951] P 10 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(foll)***
Trengganu State Economic Development Corporation v. Nadefinco Ltd [1982] 1 MLJ 365 ***(refd)***

Legislation referred to:
Wills Act 1959, s. 5

Other source(s) referred to:
Bogert, *Trusts*, 6th edn, p 558
Sarkar's Law of Evidence, 15th edn, p 1686
Scott, *The Law of Trusts*, 4th edn, vol 3, p 263

(Civil Appeal No: P-02-360-1998)
For the appellants - Lim Chee Wee (Harold Tan with him); M/s Skrine
For the 1st respondent - N Chandran (E Ramasamy, Rajan Chandran, Roy Etican & Ivan Ang with him); M/s E Ramasamy & Co
For the 2nd-5th, 9th-13th respondents - John Khoo Boo Lai (Mohd Ismail Mohamed with him); M/s Ismail Khoo & Assoc
For the 6th-8th respondents - R Shyamala Devi; M/s Hussein & Co
For the 14th-16th respondents - JA Yeoh; M/s Shearn Delamore & Co

(Civil Appeal No: P-02-409-1998)
For the appellants - JA Yeoh; M/s Shearn Delamore & Co
For the 1st respondent - N Chandran (E Ramasamy, Rajan Chandran, Roy Etican & Ivan Ang with him); M/s Ramasamy & Co
For the 2nd-5th, 9th-13th respondents - John Khoo Boo Lai (Mohd Ismail Mohamed with him); M/s Ismail Khoo & Assoc

For the 6th-8th respondents - R Shyamala Devi; M/s Hussein & Co
For the 14th-16th respondents - Lim Chee Wee (Harold Tan with him); M/s Skrine

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-63-1995]

Reported by Andrew Christopher Simon

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

Background And Issues
There are two appeals before us, they both arise from 3 consolidated suits tried at the High Court in Penang. The litigation in these appeals has to do with the estate of the late Datuk Khaw Bian Cheng. The subject matter of the appeals concerns 2 sets of wills, one set of 3 made on 24 October 1990, which we will refer to as the "1990 Wills" and another set of 3 wills made on 3 August 1992, which we will refer to as "1992 Wills".

The appellants before us in the first appeal, Appeal No.: P-02-360-98, were the defendants in all 3 suits. The respondents before us were the plaintiffs in those suits. The appellants in the second appeal Appeal No.: P-02-409-98 intervened in one of those suits, had themselves added as defendants and delivered a counterclaim about which we will say something in a moment. Suffice that we mention now that the appellants in the second appeal are seeking an order that Datuk Khaw Bian Cheng (the deceased) died intestate. In other words, they are seeking to have both the 1990 and the 1992 Wills declared invalid.

In the court below, the learned judge held the 1990 Wills to be valid but struck down the 1992 Wills. The appellants in Civil Appeal No. P-02-360-1998, the first appeal are seeking a reversal of the judge's findings that the 1992 Wills are invalid. The judgment of the learned judge is reported in [1998] 3 MLJ 457. For that reason, we will not rehearse the facts of this case in any detail. All the relevant facts and circumstances of this case have been dealt with admirably by the learned trial judge in his lengthy and carefully written judgment.

Before us the following issues were canvassed for determination. First, whether the learned judge was right in holding that the 1990 Wills were valid. The subsidiary issues connected with this question relate to the judge's rejection of the plea of undue influence and suspicious circumstances raised by the appellants in the second appeal. Second, whether the learned judge was right in striking down the 1992 Wills and in the resolution of this issue are involved

the learned judge's findings of fraud, undue influence and the existence of suspicious circumstances surrounding the making of the 1992 Wills. Third, whether the learned judge was correct in making the orders in what has been termed the recovery action. These are orders whereby, the learned judge sought to restore to the estate of the deceased monies and properties it had lost. Fourth and last, whether the learned judge was right in awarding exemplary damages. We will deal with each of these issues in turn.

The First Issue: The 1990 Wills

The facts and circumstances surrounding the making of the 1990 Wills have been dealt with at great length by the learned judge. He came to the conclusion that these wills were valid after a careful and thorough examination of the masses of evidence, both oral and documentary placed before him. For present purposes, it suffices for us to say that the 1990 Wills were drafted by Hamid Merican (PW1) on the instructions given him by the deceased. We find nothing unusual in this given the close friendship that subsisted between these 2 gentlemen. It is not in dispute that at or about the time the 1990 Wills were made, the deceased had some psychiatric problems. He was receiving treatment for this from Dr Tan Chee Kuan (PW6) who was the deceased's regular medical attendant. Immediately prior to the making of the 1990 Wills the deceased visited PW6. He wanted to be satisfied that he was mentally fit to make a will. Having had the wills prepared for him, he went along to the offices of Datuk Ghazi Ishak (PW12), a very senior practitioner of the Malaysian Bar. PW12 ascertained that the wills had been read and understood. The formal requirements had been attended to. The appellants in the second appeal had in the court below attacked the 1990 Wills on the ground that it was the product of undue influence. They also said that the making of the will was surrounded with suspicious circumstances. The learned judge rejected these contentions. This is how he did it:

> The circumstances attending the execution of the 1990 Wills, as far as could be judged, were not consistent with them having been procured by undue influence. The deceased was not deceived into making them by fraud or constrained to make them by force, threats or other forms of undue influence. The court is satisfied that there was no undue influence and that there were no circumstances that should excite its suspicion and vigilance. There was no question of fraud, and the fact that the 1990 Wills were read by the capable deceased was conclusive evidence that he knew and approved of the contents, and that presumption had not been rebutted.
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> All things considered, it must be deduced that the deceased understood and approved the provisions of the 1990 Wills.

Having read the printed evidence and the judge's discussion of it we agree entirely with the conclusions reached by the learned judge. Before us Mr. JA Yeoh attacked these findings of the learned judge. His complaint was his client's case had not been appreciated or sufficiently appreciated in the court below. With respect, we cannot agree with learned counsel. The following passage in the learned judge's judgment puts paid to the submission of counsel:

> It was not undiscerned that Cheng Hum's testimony was more of a ventilation of his anger for his disadvantageous position than of any real complaint of any undue influence in the making of the 1990 Wills. He blamed Cheng Poon for the deterioration beginning 1963 of his relationship with his father. He said that his relationship did not improve but rather got worse because of Cheng Poon's instigation and influence. He said that Cheng Poon was saying that he (Cheng Hum) had no son to carry on the family name. He said his relationship with his parents, up to 1988, did not improve. Next, he blamed Cheng Poon for the sale of his Ayer Itam lands, the RM130,000.00 paid to Cheng Liat and Cheng Poon, the sale of his lands in Bukit Tengah, Butterworth, the attempts to force him to sell his remaining Ayer Itam lands, the threats to disown him, the attempts to claim back the properties given him, the termination of his monthly allowance and the instruction barring him from Pykett Avenue. He said that his father would not leave him RM20,000.00 but would have been fair and not leave him much less than his brothers. He believed it was all due to Cheng Poon's instigation. Cheng Poon could influence the deceased and even made decisions for the deceased, he said. Blame was pinned all around. Surprisingly, Cheng Hum uttered not a word that the 1990 Wills were procured by undue influence.
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> Mr. Yeoh exhorted that Cheng Poon's influence over the deceased and the deceased's trust in Hamid were the principal reasons for the 1990 Wills and that the 1990 Wills were not wills of the deceased but were procured by the importunity of Cheng Poon and Hamid. He asserted that deceased fell prey to Cheng Poon's manipulation after the death of Ooi Geen Peen.
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> The gravamen for that hypothesis was the alleged importunity of Cheng Poon and Hamid. As said, those alleging undue influence must prove it. But there was no evidence that undue influence had been exercised in relation to the 1990 Wills. There was no evidence that the other brothers, either jointly and or severally, had obtained Hamid's help in procuring the 1990 Wills. There was no evidence that importunity, be that of Cheng Poon and or Hamid, had been visited and or inflicted upon the deceased into making the 1990 Wills, or that Cheng Poon was involved in the preparation of the 1990 Wills. There was no evidence, and it was also not shown, that Cheng Poon's influence over his father had been exercised in relation to the 1990 Wills. Hamid testified that only the deceased instructed him to prepare the 1990 Wills and that none of the sons knew of the 1990 Wills. Cheng Bok and Cheng Liat testified that they had no knowledge whatsoever of the preparation and execution of the 1990 Wills. And there was no evidence that Cheng Poon and Hamid had banded together and exerted their respective influence on the deceased.

Learned counsel for the appellants in the second appeal also argued that the learned judge had applied the wrong test. He submitted that the learned judge focused on the issue of undue influence but did not judicially appreciate the evidence as constituting suspicious circumstances. Mr. Yeoh has taken us through several passages in the evidence which he says are acknowledgments by the respondents in these appeals that there were circumstances which could give rise to a well-grounded suspicion that the will was not that of the deceased. Again we cannot agree. In our judgment the passage quoted above in paragraph 6 deals with this adequately. We also cannot agree that the learned judge applied the wrong test. His Lordship in the course of his judgment referred to the following passage in the judgment of Wilmer J in *Re R. deceased* [1951] P. 10, 16:

> The conclusion I draw from these authorities (*Davis v. Mayhew* [1927] P. 264; *Low v. Guthrie* [1909] AC 278) to which I have referred is that, when it is a question of knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself.

When the learned judge's judgment is read as a whole it is apparent that he kept this test in the forefront of his mind when evaluating the evidence relied on by Mr. Yeoh's client as constituting suspicious circumstances. There is therefore no misdirection on this part of the case.

The learned counsel also complains that the learned judge did not address his mind to the several important reliefs sought in the counterclaim of his client. With respect, we think there is nothing in this argument. At the end of the day, once the learned judge came to the conclusion that the 1990 Wills were valid that was for all practical purposes the end to Mr. Yeoh's clients' case. Any declarations or other ancillary relief that the judge may have been inclined to grant would only have benefited the estate in which these appellants had no interest. For the reasons given, we do not think that any valid complaint could be directed against the judge's approach to the case of the appellants in the second appeal. We would therefore uphold the finding of the learned judge that the 1990 Wills are valid and affirm the orders he made against Mr. Yeoh's clients.

The Second Issue: The 1992 Wills

The learned judge's finding in respect of the 1992 Wills was that they were the product of fraud and undue influence. He further held that there were suspicious circumstances surrounding the making of the 1992 Wills which were not dispelled by the appellants in the first appeal. We find it unnecessary to reproduce all those passages in which the learned judge considered the issue at hand. Two matters are quite clear, as pointed out by Datuk N Chandran,

common counsel for the respondents in this appeal, the 1992 Wills failed the test of formal validity and it was really unnecessary for the learned judge to have continued with the other issues.

There can be no dispute on the proved and admitted facts, that the witness Dr. Gafoor (PW2) witnessed the wills in his clinic in the absence of the deceased. This plainly does not meet the requirement of s. 5 of the Wills Act 1959. For completeness, that section is now reproduced:

> (1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
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> (2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary:
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> Provided that every will shall, as far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid under this section if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance?
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> (a) that the signature shall not follow or be immediately after the foot or end of the will; or
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> (b) that a blank space shall intervene between the concluding word of the will and the signature; or
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> (c) that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses; or
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> (d) that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature; or
>
> (e) that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature,

and the enumeration of the above circumstances shall not restrict the generality of this proviso; but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

However, the learned judge did go into the substantive validity of the 1992 Wills and in that process made important findings of fact, some of which warrant reproduction here:

There was strong and unremitting suspicion that the deceased was deceived into making the 1992 Wills by fraud (in the civil sense) or was constrained to make it by undue influence. Contrary to Mr Koh's contention, the changes to the 1990 Wills were not consistent with the changes related on 3.8.1992 to Dr. Tan who testified that the deceased only informed him of the change of trustees. The fact that the deceased had no independent advice, legal or otherwise, and that his other children were kept away was not satisfactorily explained. The radical departure from the 1990 Wills, radical because all changes solely favoured the nuclear family of the person who prepared the 1992 Wills which obviously possessed great influence with the deceased, was not explained. The strong suspicion that the radical changes were not the result of the free volition of the deceased (*Marsh v. Tyrell* [1828] 2 Hagg. Ecc. 84) was not removed.

On the point of undue influence, the judge found as follows:

Even if there was no direct evidence of undue influence, there was more than ample evidence that the deceased was so far under the undue influence of Cheng Poon and his family that a conclusion is warranted that undue influence was exercised in relation to the 1992 Wills (*Boyse v. Rossborough* [1857] 6 HLC 2). The circumstances attending the execution were consistent with its having been procured by undue influence. The circumstances were not consistent with any other hypothesis (*Boyse v. Rossborough (supra)).* The proponents of the 1992 Wills failed to show the righteousness of the transaction or that the 1992 Wills expressed the true will of the deceased (*Finny v. Govett* [1908] 25 LTR 186). All said, the circumstances attending the execution were that suspicious that even if undue influence was not proved, but it was, the court is not satisfied as to the righteousness of the transaction (*Barry v. Butlin* [1838] 2 Moo. PC 480; *Fulton v. Andrew* [1875] LR 7 HL 448; *Re Hartley, Hartley v. Fuld (Fuld intervening) (No. 3)* [1965] 3 All ER 776). Howard who prepared the Wills under which he and his family took their extraordinary bounty and assumed all power failed to substantiate the truth, honesty and righteousness of the 1992 Wills (*Fulton v. Andrew (supra)).* Howard failed to give clear proof that the deceased knew and approved of that part under which he and his family took their extraordinary benefits (*Hegarty v. King* [1880] 5 LR Ir 249, 7 LR Ir 18 affd). 'This means that … the issue (substantial validity) must be found against (Cheng Poon, Richard and Howard)' *(Barry v. Butlin (supra))*. The 1992 Wills purporting to be executed by the deceased have no validity whatsoever and cannot be admitted to probate.

It must not be forgotten that very serious allegations were levelled against the first appellant, Khaw Cheng Poon. It was incumbent on him to have gone into the witness box to repel the case put against him. He did not do that. His failure to testify was commented on unfavourably by the learned judge and we do not find any misdirection in this respect.

For principle and authority, we need go no further than to quote the following passage from *Sarkar's Law of Evidence*, 15th edn at p. 1686:

> Presumptions are necessarily made against parties who having a knowledge of the facts in dispute will not subject themselves to examination, when a *prima facie* case is made against them, and when by their own evidence, they might have answered it (*Nawab Syed v. Amanee*, 19 WR 149 PC pp 150-51. See also *Sabbaji v. Shidappa*, 26 B 392 in which the circular order of the Bombay High Court dated 31st September, 1900 was referred). The Judicial Committee observed: '… Under such circumstances it is impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness-box. It raises a presumption against them' (*Durga v. Mathura*, 15 CWN 717, 721-22 10 IC 963 PC).

It is difficult to see how in the absence of an explanation from Khaw Cheng Poon that the judge could have made any findings other than the one he made. We remind ourselves that the issues raised in this case such as fraud, undue influence, the existence of suspicious circumstances are all essentially questions of fact. Our function as an appellate court on appeals such as the present have been discussed in a number of cases. By far, the leading case on the subject is *Clarke v. Edinburgh Tramways Co*. [1919] SC (HL) 35. In that case, Lord Shaw of Dunfermline had this to say:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, this psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without these advantages, sometimes broad and sometimes subtle, which

> are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

We must recognise our lack of the audio visual advantage enjoyed by the learned judge. This is not a case where that advantage has not been availed of by the primary trier of fact. Quite the contrary. For the reasons already given, we would therefore uphold learned judge's finding that the 1992 Wills were invalid. That brings us to the third issue.

The Third Issue: The Recovery Orders

The learned judge having found that the first defendant and his sons had removed money and properties belonging to the estate made orders to achieve restitutio in integrum. The orders about which complaint is made are the following:

(i) that the estate do deduct the sum of RM577,000 (being RM225,000, RM39,000, RM182,000, RM31,000 and RM100,000) from Howard's interests and the sum of RM131,000 (being RM31,000 and RM100,000) from Gim Chuan's interests, in Khaw Bian Cheng Sdn. Bhd; and

(ii) that Cheng Poon and Richard do pay the Estate the sum of RM255,000 received by Bok Eng.

The complaint in respect of (i) is that Howard Khaw was not a party to the recovery action and therefore no order could be made against him. In this regard, we accept Datuk Chandran's submission that the order is not directed against Howard Khaw but merely is made for the benefit of the estate. As can be seen from a plain reading of the order, Howard Khaw is not required to do anything or act, neither is he required to make any payment. We do not find it necessary to go any further than that to uphold the first order above and to reject Mr. Lim Chee Wee's argument in that regard.

With regards to (ii), there is really no merit in the complaint of the appellants in the first appeal that they were being required to make payments received by a third party, namely Khaw Cheng Poon's wife, Lim Bok Eng. The answer is found in the following passage in Bogert's work *Trusts*, 6th edn at p. 558:

> It is elementary that a trustee who commits a breach of trust can be required to pay from his own pocket the damages caused to the trust beneficiaries. He can be compelled to replace the trust property lost by his wrongdoing and if he does not comply with the direction to make restoration a judgment can be collected out of his personal assets. A failure to perform any of the duties placed upon him by common law, statute or trust instrument, if loss is caused thereby,

> will give the beneficiaries, a co-trustee or a successor trustee a right to secure from the court of equity a decree that the wrongdoing trustee pay into the trust fund the amount of damages suffered.

So too here. The respondents, Khaw Cheng Poon and Richard Khaw had by their own dishonesty secreted away for their own use and benefit monies and properties belonging to the Estate, including the sum of RM225,000 mentioned in order (ii) above. They must disgorge. That is what the order requires them to do. There is therefore nothing wrong with it.

We must now deal with the separate order arising from (i) above. The learned judge required Khaw Gim Chuan to disgorge her interest in the family company. Khaw Gim Chuan was not a party to the proceedings. No order could therefore have been made against her. Datuk Chandran, at the very commencement of this appeal through his written submission, had indicated he did not intend to uphold this part of the order. We accordingly discharge it.

One final point on the recovery order. Nowhere in his judgment did the learned judge grant any relief in respect of the Porsche car that had to been taken away from Richard Khaw. There is an obvious reason for this. The learned judge found as a fact, which we accept, that the Porsche car was gifted by the deceased to Richard Khaw in the former's lifetime. However, when the order came to be extracted, it included a reference to the Porsche car. That was obviously an error, a slip, made in the course of the preparation of the order. We accordingly direct that part of the sealed order be set aside.

The Fourth Issue: Exemplary Damages

The judge was justifiably outraged by the conduct of the appellants in the first appeal (first, second and third defendants in the court below). He wanted to give expression to his outrage. He therefore made an award of exemplary damages against the first, second and third appellants of RM500,000. Mr. Lim Chee Wee, learned counsel for the appellants, has with his usual ability argued that this award cannot be sustained in principle and authority. In support of his submission, Mr. Lim drew our attention to the following passages in the speech of Lord Devlin in *Rookes v. Barnard* [1964] AC 1129:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

Mr. Lim argued that there is not a shred of evidence to show any profit having been made by his clients. We agree with his submission. Exemplary damages are only awarded in very special circumstances. These circumstances are contained in the speech of Lord Devlin to which we have already referred. That no new categories are admissible to the Devlin list has now been settled

in the decision of the House of Lords in *Cassell & Co Ltd v. Broome* [1972] AC 1027. We therefore have no choice but to set aside the award for exemplary damages.

Datuk Chandran has strenuously argued that even if the award of exemplary damages is set aside, the deceased's estate should be compensated by an award of compound interest. The principles governing the amount of compound interest is set out in the leading text on the subject *The Law of Trusts*, 4th edn, vol. 3 by Scott at p. 263:

> There is no definite rule on the question whether the trustee is liable for simple interest or for compound interest. Ordinarily, however, he is liable only for simple interest. But if he has actually received compound interest, he is of course accountable for such interest. If he uses trust funds in his own business and it does not appear what return he has received, it has been held in a number of cases that he is chargeable with compound interest, the court holding that there is an inference that he has received a profit at least equal to compound interest. It would seem, however, that if he can show that he did not receive so much, he should not be liable for compound interest. It has also been held that he is liable for compound interest where it was his duty to reinvest interest received by him, as where by the terms of the trust he is directed to accumulate.
>
> In some cases it has been held that he is liable for compound interest wherever he intentionally commits a breach of trust. There is a statutory provision to this effect in some states. In some cases, however, it has been held that the mere fact that the trustee intentionally commits a breach of trust does not of itself render him liable for compound interest.

In a gist, it appears from the foregoing passage that whether compound interest would be granted in a particular case, is one where there has been an intentional breach of trust on the facts of the particular case. Datuk Chandran has also drawn our attention to the judgment of Salleh Abas FJ in *Trengganu State Economic Development Corporation v. Nadefinco Ltd.* [1982] 1 MLJ 365 (at p. 369):

> If it is shown that he had made use of it as a working capital for his business or employed it in trade and has presumably earned interest or profits, the measure of compensation is compound interest. In *Wallersteirner v. Moir (No. 2)* [1975] QB 373, Lord Denning M.R. quoted with approval the judgment of Lord Hatherley LC in *Burdick v. Garrick* [1870] 5 Ch. App. 233 which is as follows:
>
> > The court presumes that the party against whom relief is sought has made that amount of profit which person ordinarily do make in trade, and in these cases the court directs rests to be made – i.e. compound interest.

> The sum total of these cases is that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use and that interest would be simple or at rests depending upon the circumstances of the case. It is simple interest if the accounting party simply keeps it or actually received such rate, but it is compound if the court could infer from circumstances that the money was used in the accounting party's business.

We have examined the record very carefully and we are unable to find an iota of evidence to suggest that Mr. Lim's clients had used the monies in question in their business. Accordingly, we are unable, with respect to accede to Datuk Chandran's submission on this point. We have no alternative but to affirm the order as made by the learned judge. In so doing, we are guided by the principles well-established in our jurisprudence that awards of interest and the rate of such awards are really matters within the discretion of the court of first instance and that they should not be interfered with unless some error in principle is shown. We do not find any appeallable error on the part of the judge as regards to this part of the case.

Costs

In the court below, the learned judge ordered the first, second and third defendants to bear their own legal costs. He also ordered the fourth and fifth defendants, the appellants in the second appeal before us to recover their costs from the estate. A similar order was made in respect of the respondents before us. We affirm these orders.

As regards the costs of their appeal, we would make the following orders:

(a) we direct the first, second and third appellants in the first appeal to pay 90% of the costs of the Estate incurred in the prosecution of this appeal;

(b) the costs of the appellants in the second appeal will be taxed and paid out of the Estate; and

(c) the costs of the respondents will also be taxed and paid out of the Estate.

The deposit paid into court by the appellants in the first appeal shall be paid out to the deceased's estate to account of taxed costs.

The deposit by the appellants of the second appeal shall be refunded to them.

Conclusion

This is a particularly difficult case. It involves many issues. It concerns numerous documents and voluminous oral testimony. The task the learned trial judge had to face was Himalayan. He discharged that task admirably. The way in which he has dealt with the issues and findings required of him to be made has rendered our task a particularly easy one. So have the arguments

of counsels who have presented their submissions to us. But for the assistance we have received from Mr. J.A. Yeoh, Mr. Lim Chee Wee and Datuk N Chandran, this extemporary judgment would not have been possible. We must therefore extend our gratitude to them.

These appeals will be disposed of in the terms set out above.